

Gregg M. Galardi, Esq.  
 Ian S. Fredericks, Esq.  
 SKADDEN, ARPS, SLATE, MEAGHER &  
 FLOM, LLP  
 One Rodney Square  
 PO Box 636  
 Wilmington, Delaware 19899-0636  
 (302) 651-3000

Dion W. Hayes (VSB No. 34304)  
 Douglas M. Foley (VSB No. 34364)  
 MCGUIREWOODS LLP  
 One James Center  
 901 E. Cary Street  
 Richmond, Virginia 23219  
 (804) 775-1000

- and -

Chris L. Dickerson, Esq.  
 SKADDEN, ARPS, SLATE, MEAGHER &  
 FLOM, LLP  
 333 West Wacker Drive  
 Chicago, Illinois 60606  
 (312) 407-0700

Counsel to the Debtors and  
 Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE EASTERN DISTRICT OF VIRGINIA  
 RICHMOND DIVISION

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	:	
In re:	:	Chapter 11
	:	
CIRCUIT CITY STORES, INC.,	:	Case No. 08-35653 (KRH)
<u>et al.</u> ,	:	
	:	
Debtors.	:	Jointly Administered
- - - - -	x	

**DEBTORS' OBJECTION TO TOMTOM, INC.'S MOTION FOR AN ORDER  
 UNDER SECTIONS 105, 362 AND 363 MODIFYING THE AUTOMATIC  
 STAY TO PERMIT THE EXERCISE OF SETOFF AND/OR RECOUPMENT  
 RIGHTS AGAINST THE DEBTORS**

The debtors and debtors in possession in the  
 above-captioned jointly administered cases (collectively,

the "Debtors" or "Circuit City")<sup>1</sup> hereby submit their objection (the "Objection") to the Motion of TomTom, Inc. For an Order Under Sections 105, 362 and 363 Modifying the Automatic Stay to Permit the Exercise of Setoff and/or Recoupment Rights Against the Debtors (the "Motion"). In support of the Objection, the Debtors respectfully represent:

### **BACKGROUND**

#### **A. The Bankruptcy Cases.**

1. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

2. The Debtors continue to manage and operate their businesses as debtors in possession pursuant

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), Prahs, Inc. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 9950 Mayland Drive, Richmond, Virginia 23233.

to sections 1107 and 1108 of title 11 of the U.S. Code (the "Bankruptcy Code").

3. On November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

**B. The Debtors And TomTom, Inc.**

4. TomTom and the Debtors have had a long-standing business relationship whereby the Debtors purchased merchandise from TomTom. At various times throughout their working relationship, TomTom has offered incentives to its customers, including Circuit City, for merchandise purchases.

5. Most recently, in the fall of 2008, TomTom introduced its 2008 "GiveGive" Holiday Promotion (the "Promotion") pursuant to which retailers who opted to participate would receive credits (the "Sell-through Credits") for sales of certain models of TomTom devices. Under the terms of the Promotion, the Sell-through Credits would accrue during the period from November 23,

2008 through January 3, 2009. The Sell-through Credits could be used to offset future purchases of TomTom devices. A copy of the Promotion is attached as Exhibit A.

6. Pursuant to a letter agreement dated October 17, 2008 (the "Letter Agreement"), Circuit City purchased 125,000 units of TomTom's Model 125 product (the "Product") for delivery on November 3, 2008. The Letter Agreement provided that Circuit City would pay for the Product in two installment payments: a payment of \$8 million to be made prior to the anticipated November 3, 2008 delivery; and a second payment of \$8.65 million to be made on December 2, 2008. The Letter Agreement further provided that the second installment payment would be "netted against the sell through credits available to Circuit City under the current Model 125 sell-through credit program (separately documented)." A copy of the Letter Agreement is attached as Exhibit B.

7. In accordance with the Letter Agreement, on or prior to November 3, 2008, the Debtors remitted payment in the amount of \$8 million to TomTom. Similarly, on or about November 3, 2008, TomTom delivered

the Product in accordance with its obligations under the Letter Agreement.

8. Since the Product was received, the Debtors have been selling the Product in their stores and through online purchases. Beginning on November 23, 2008, the Debtors began to accrue Sell-through Credits pursuant to the Promotion. The Debtors continued to accrue Sell-through Credits until the Promotion ended on January 3, 2009.

9. However, due to the filing of the Debtors' bankruptcy petitions, the Debtors were prohibited from and indeed did not make the December 2, 2008 payment under the Letter Agreement.

**C. TomTom's Pre-petition Claims**

10. In its Motion, TomTom alleges that, as of the Petition Date, it was owed \$10,196,426.21 (the "Pre-petition Claim"). Of this amount, TomTom further alleges that it was owed \$8,412,529.56 on account the Product it delivered under the Letter Agreement (the "Merchandise Claim").

11. On or about November 24, 2008, TomTom filed a section 503(b)(9) proof of claim on account of

the Merchandise Claim, and made a reclamation demand on account of the Product. To date, upon information and belief, TomTom has not filed a claim for the difference between the amount of the Merchandise Claim and the amount of the Pre-petition Claim.

**D. Pre-petition Transfers To TomTom.**

12. In addition to transferring the first installment payment -- \$8 million -- to TomTom prior to the Petition Date, the Debtors also made five additional pre-petition transfers to TomTom (collectively, the "Pre-petition Transfers"). Relevant information relating to the Pre-petition Transfers is as follows:

<b>Payment Date</b>	<b>Payment Amount<sup>2</sup></b>	<b>Invoice Date(s)</b>
8/15/08	\$648,790.38	10 Invoices dated between June 11, 2008 and June 12, 2008
8/18/08	\$132,011.76	5 Invoices dated June 17, 2008
9/1/08	\$677,496.55	29 Invoices dated between June 17, 2008 and June 27, 2009
10/22/08	\$107,764.91	94 Invoices dated between July 7, 2008 and August 26, 2008

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<sup>2</sup> The "Payment Amount" includes credits available to the Debtors that were offset prior to remitting payment to TomTom.

10/27/08          \$36,702.40          8 Invoices dated between August 20, 2008 and August 21, 2008

**OBJECTION**

13. TomTom asks this Court for relief from the automatic stay to exercise its setoff and/or recoupment rights against the Debtors. The Debtors respectfully request that this Court deny the Motion on various grounds, including that the Motion is procedurally improper and premature and TomTom cannot satisfy the standards for setoff, recoupment or relief from the automatic stay.

**I. THE MOTION IS PROCEDURALLY IMPROPER.**

14. It is black-letter law that, under Bankruptcy Code section 365(d)(2), a debtor in possession has until confirmation of a plan to assume or reject any executory contract. 11 U.S.C. § 365(d)(2). Critically, until the debtor assumes an executory contract, the non-debtor party is prevented from enforcing the terms of that contract. NLRB v. Bildisco & Bildisco, 465 U.S. 513, 532 (1984) ("The filing of the petition in bankruptcy means that the . . . agreement is no longer immediately enforceable, and may never be enforceable

again."); see also In re El Paso Refinery, L.P., 220 B.R. 37, 43 (Bankr. W.D. Tex. 1998) ("From the moment of filing to the moment of assumption or rejection, the non-debtor party is held to be barred from enforcing the contract and its terms."); In re Metro Transp. Co., 87 B.R. 338, 339 (Bankr. E.D. Pa. 1988) ("We hold that a formal assumption of an executory contract by a debtor is required to render an executory contract enforceable against a debtor.").

15. As set forth above, neither the Letter Agreement nor the Promotion has yet been assumed or rejected by the Debtors pursuant to Bankruptcy Code section 365. Thus, because TomTom is seeking to enforce the Letter Agreement and the Promotion by obtaining an order directing the Debtors to setoff or recoup allegedly in accordance with the terms of those agreements, a motion for relief from the automatic stay is not the proper procedural vehicle. Instead, TomTom must first obtain an order compelling the Debtors to assume or reject the agreements. See, e.g., In re El Paso Refinery, L.P., 220 B.R. at 44; Bistrrian v. East Hampton Sand & Gravel Co., Inc. (In re East Hampton Sand & Gravel Co.,



Inc.), 25 B.R. 193, 198 (Bankr. E.D.N.Y. 1982); but see In re Valley Media, inc., 279 B.R. 105, 138 (Bankr. D. Del. 2002) (noting in dicta that the remedy for terminating a “non-assumable” contract is to seek relief from the automatic stay, and concluding that a debtor need not assume an agreement to enjoy the rights thereunder).

16. Specifically, in El Paso, the bankruptcy court rejected the efforts of a party to an executory contract with a debtor to obtain relief from the automatic stay to terminate such contract, stating that:

By limiting the non-debtor party to the § 365 remedies, the value of the executory contract can be preserved for the estate, while allowing the estate an appropriate period of time to evaluate its options. If the contract is terminated at the request (or behest) of the non-debtor party, then the estate’s options are literally foreclosed, undermining the structure and intent of the drafters of the Code. A party to an executory contract has no more right to ‘relief from stay’ to ‘terminate’ a contract with the estate than does any other unsecured creditor whose contract (executory or not) has been breached.

El Paso, 220 B.R at 44; see also East Hampton, 25 B.R. at 198 (noting lessor is preempted from seeking relief from stay until debtor is required to assume or reject lease).

17. Here, the Sell-through Credits earned under the Promotion are a valuable asset of the estate and will likely prove valuable going forward, either for future merchandise purchases or to assign to a purchaser in a going concern transaction. As such, any decisions regarding the Sell-through Credits and the Promotion, as well as the Letter Agreement, will be made in the context of the Debtors' further restructuring efforts. Thus, it is important that the Debtors be given the full measure of time provided by the Bankruptcy Code to determine the proper treatment of the Letter Agreement, the Sell-through Credits and the Promotion.

18. Based on the foregoing, the Motion should be denied because it is the procedurally incorrect vehicle for obtaining the relief TomTom requests. Instead, TomTom must first obtain an order compelling assumption or rejection of the Letter Agreement and/or the Promotion. Indeed, until the Debtors assume or reject the Letter Agreement and/or Promotion, TomTom's request to setoff or recoup its claims and debts under those agreements is premature.

**II. THE MOTION IS PREMATURE BECAUSE TOMTOM'S CLAIM SHOULD BE HELD IN ABEYANCE UNDER BANKRUPTCY CODE SECTION 502(d) .**

19. As set forth above, it appears that TomTom was the recipient of certain transfers on account of antecedent debts, made within 90 days of the Petition Date and while the Debtors were presumed insolvent, and that allowed TomTom to receive more than it would had such transfers not been made. Based on these facts, there is a colorable claim that the Pre-petition Transfers are avoidable under Bankruptcy Code section 547. See 11 U.S.C. § 547(b) (setting forth the requirements of an avoidable transfer thereunder).

20. Given the potential avoidability of the Pre-petition Transfers, Bankruptcy Code section 502(d) provides that all of the Pre-petition Claim, including the Merchandise Claim, should be held in abeyance pending resolution of any avoidance actions. Specifically, Bankruptcy Code section 502(d), provides as follows:

the court shall disallow any claim of any entity from which property is recoverable under section . . . 550 . . . of this title or that is a transferee of a transfer avoidable under section . . . 547 . . . of this title, unless such entity or transferee has paid the amount, or turned over

any such property, for which such entity or transferee is liable under section . . . 550 . . . of this title.

11 U.S.C. § 502(d). Thus, section 502(d) expressly and unequivocally applies to “any claim of any entity.” See also Central Virginia Community College v. Katz, 546 U.S. 356, 271 (2006) (noting that, under section 502(d), if the [creditor] has a claim against the bankrupt estate, the avoidance determination operates to bar that claim until the preference is turned over); In re Bob Grissett Golf Shoppes, Inc., 50 B.R. 598, 607 (Bankr. E.D. Va. 1985) (“[S]ection 502(d) requires that the court disallow the claim of any entity that has been the recipient of an avoidable transfer unless the entity has disgorged the property.”).

21. Section 502(d) “is designed to assure an equality of distribution of the assets of the bankruptcy estate” among similarly situated parties in interest. Campbell v. United States (In re Davis), 889 F.2d 658, 662 (5th Cir 1989); see also Keppel v. Tiffin Sav. Bank, 197 U.S. 356, 361 (1905) (discussing Bankruptcy Act section 57g, the precursor to section 502(d), and finding that the “fundamental purpose of the provision in ques-

tion was to secure an equality of distribution of the assets of a bankrupt estate"). It is further "intended to have a coercive effect of insuring compliance with judicial orders." Davis, 889 F.2d at 661.

22. In order to effectuate the purposes of 502(d), "a claim may be disallowed at least temporarily and for certain purposes, subject to reconsideration, simply upon the allegation of an avoidable transfer." In re Lambert Oil Co., 347 B.R. 508, 522, n. 6 (W.D. Va. 2006) (citing 4 Collier on Bankruptcy ¶ 502.05[2][a] (15th ed. rev. 2003)). Thus, disallowance under section 502(d) does not require that the transfer have been previously avoided. See also In re Red Dot Scenic, Inc., 313 B.R. 181, 185 (Bankr. S.D.N.Y. 2004) ("The plain language of section 502(d) does not condition disallowance on the transferee's failure to satisfy a judgment; instead, it states that 'the court shall disallow any claim of any entity from which property is recoverable . . .'" (emphasis in original)).

23. At this time, the Debtors have not completed their analysis of Pre-petition Transfers or commenced any avoidance actions. Indeed, the Debtors are

still well within the time limits set by Bankruptcy Code section 546(a) to do so. Notwithstanding the foregoing, because the facts suggest that TomTom may have received one or more avoidable transfers, the Pre-petition Claim, including the Merchandise Claim, should be held in abeyance pending resolution of any avoidance actions against TomTom.

24. As a result, it is premature to allow TomTom to setoff or recoup against any portion of the Pre-petition Claim. Doing so would forfeit the Debtors' rights under section 502(d) and abdicate the policies underlying the provision.

**III. TOMTOM CANNOT SETOFF POSTPETITION SELL-THROUGH CREDITS AGAINST THE MERCHANDISE CLAIM.**

25. TomTom argues that it is entitled to set-off the Merchandise Claim arising under the Letter Agreement against the Sell-through Credits accrued pursuant to the Promotion. However, because the Sell-through Credits arose post-petition, they can not be used to offset the Merchandise Claim, which arose pre-petition.

26. In order for a creditor to have a right of setoff under Bankruptcy Code section 553, "it must meet four conditions: 1) the creditor must hold a pre-petition claim against the debtor; 2) the creditor must owe a debt to the debtor that arose pre-petition; 3) the obligations are mutual; 4) the obligations are valid and enforceable." Tavener v. United States (In re Vance), 298 B.R. 262, 267 (Bankr. E.D. Va. 2003). The burden is on the creditor to establish each element by a preponderance of the evidence. In re Camellia Food Stores, Inc., 287 B.R. 52, 59 (Bankr. E.D. Va. 2002). Here, TomTom has failed to satisfy the second of these requirements -- that its debt arise prior to the Petition Date.

27. The Fourth Circuit uses the "conduct test" to determine when a claim arises. See, e.g., Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988). Under the conduct test, claims arise at the time the events giving rise to the claim (or debt) occur. Id. at 200-203; In re U.S. Airways, Inc., 365 B.R. 624, 629 (Bankr. E.D. Va. 2007). Here, TomTom seeks to offset

the Sell-through Credits it owes to the Debtors against the Merchandise Claim.

28. TomTom asserts (and the Debtors agree) that the Letter Agreement was entered into prior to the Petition Date, and all Product was delivered prior to the Petition Date. Thus, the conduct giving rise to the Merchandise Claim occurred pre-petition.

29. On the other hand, the Debtors and TomTom disagree over when the Sell-through Credits arise. Based on the Promotion, it is clear that the event or conduct giving rise to the Sell-through Credits is the sale of the Product during the period from November 23, 2008 until January 3, 2009. This period is entirely post-petition. Thus, the conduct giving rise to TomTom's obligation to the Debtors occurred post-petition.

30. However, TomTom asserts that the Sell-through Credits were due "upon the prepetition delivery of the 125s". Motion at ¶ 16. This is meritless, as it contradicts the clear language of the Promotion. Promotion at 1 ("TomTom will provide sell-through credit for all product sold during the 2008 GiveGive promotional program . . ."). Indeed, the Sell-through Credits did



not exist until the Debtors sold the Product. See id. Instead, the Sell-through Credits first arose as (and only if) the Debtors sold Product during the November 23, 2008 through January 3, 2009 Sell-through Credit period. See id. Thus, TomTom is seeking to setoff its pre-petition Merchandise Claim against a post-petition obligation owed to the Debtors -- the Sell-through Credits.

31. However, embodied in section 553 and in the four requirements for setoff stated above is the principle that a creditor cannot offset a post-petition obligation to the estate against a pre-petition claim owed by the estate. See In re Camellia Food Stores, 287 B.R. at 60; In re Georgetown Steel Co., LLC, 318 B.R. 313, 326 (Bankr. D.S.C. 2004). By attempting to offset the post-petition Sell-through Credits against the pre-petition Merchandise Claim, TomTom is seeking to do just that. TomTom has failed to satisfy its burden of demonstrating that both the Merchandise Claim and the Sell-through Credits arose prior to the Petition Date and, thus, the Debtors respectfully request that this Court find that TomTom is not entitled to any rights of setoff.

32. Absent a right of setoff, the automatic stay of Bankruptcy code section 362 applies to TomTom without exception. Thus, the Debtors further request that this Court deny TomTom's request to modify the stay to permit setoff.

**IV. TOMTOM CANNOT RECOUP ITS PRE-PETITION CLAIMS AGAINST THE SELL-THROUGH CREDITS BECAUSE THE COUNTERVAILING OBLIGATIONS AROSE FROM DIFFERENT CONTRACTS.**

33. TomTom further contends that the doctrine of recoupment entitles it to recoup the Merchandise Claim under the Letter Agreement against the Sell-through Credits under the Promotion. However, TomTom does not have a valid right of recoupment because its claim and its debt arise from different contracts.

34. Numerous courts have held that, in light of the bankruptcy policy in favor of equal treatment of creditors as well as the prepetition-postpetition division of claims embodied in the Bankruptcy Code, the doctrine of recoupment is a limited one and should be narrowly construed. See, e.g., In re Camellia Food Stores, 287 B.R. at 61 (citing Ashland Petroleum Co. v. Appel (In re B&L Oil Company), 782 F.2d 155, 158 (10th Cir.

1986)); Westinghouse Credit Corp. v. D'Urso, 278 F.3d 138, 147 (2d Cir. 2002); In re Anes, 195 F.3d 177, 182 (3d Cir. 1999).

35. The Fourth Circuit has defined recoupment as "the right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of *the very contract* giving rise to the plaintiff's claim." First Nat'l Bank of Louisville v. Master Auto Serv. Corp., 693 F.2d 308, 310 n. 1 (4th Cir. 1982) (emphasis added). Courts in this Circuit have thus found that there are two requirements for the doctrine of recoupment to apply: first, the source of the creditor's claims must be a contract; and second, the debtor's and creditor's claims must arise out of the same contract. In re Vance, 298 B.R. at 267; Thompson v. Board of Trustees of the Fairfax County Police Officers Retirement System (In re Thompson), 182 B.R. 140, 147 (Bankr. E.D. Va. 1995).

36. Here, TomTom's debt -- the Sell-through Credits -- arises out of Circuit City's participation in the Promotion. On the other hand, TomTom's claim -- the

Merchandise Claim -- arises out of the Letter Agreement. See In re Camellia Food Stores, 287 B.R. at 60-61 (denying recoupment because renewal of insurance policy constitutes a new contract such that single contract requirement was not met).

37. Although the Letter Agreement references the Promotion, the Letter Agreement notes that the Promotion is "separately documented." The mere reference of one agreement by another agreement is not sufficient to establish the "single contract" standard. Cf. In re Georgetown Steel, 318 B.R. at 332 (denying recoupment despite fact that prior and renewal insurance policies contained cross-default provisions referencing each other). Thus, the Promotion and the Letters Agreement are separate contracts.

38. Accordingly, this Court should deny Tom-Tom's request for recoupment.

**V. THE BALANCE OF THE EQUITIES FAVORS THE DEBTORS AND DISFAVORS GRANTING EITHER SETOFF OR RECOUPMENT.**

39. Assuming, arguendo, this Court finds that either setoff or recoupment are applicable, this Court

should nonetheless deny TomTom's requests because the equities weigh against granting the requested relief.

40. Setoff and recoupment are both equitable remedies. University Medical Ctr. v. Sullivan (In re University Medical Ctr.), 973 F.2d 1065, 1079-80 (3rd Cir. 1992). As such, both setoff and recoupment are not automatic, but discretionary, and cannot be applied without taking into consideration balancing of equities and hardships in the case. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 193 (1978); Vance, 298 B.R. at 269; St. Francis Physician Network, Inc. v. Rush Prudential HMO, Inc. (In re St. Francis Physician Network, Inc.), 213 B.R. 710, 719. (Bankr. N.D. 111, 1997). In conducting the balancing test, this Court should consider "whether any party would receive a windfall." Id.; see St. Francis Physician Network, Inc., 213 B.R. at 720 (denying recoupment where it "would have been inequitable to other creditors because the estate would have received less for the debtor's post-petition performance than the fair price of the that performance, with the difference being a windfall to [the recouping creditor].").

41. Here, TomTom would receive a windfall never contemplated by either TomTom or the Debtors. Under the Promotion and the Letter Agreement, the parties contemplated that a small portion of Sell-through Credits -- credits generated from the November 23, 2008 Promotion commencement date and prior to the December 2, 2008 installment payment date -- would be used to "net" a portion of the second installment payment. Thereafter, the remaining Sell-through Credits would be available to "net" against future merchandise purchasers.

42. By the Motion, TomTom seeks to recover a windfall by "netting" -- through setoff and/or recoupment -- the full amount of the Sell-through Credits against TomTom's pre-petition Merchandise Claim.

43. TomTom attempts to disguise this windfall by asserting that the Debtors are receiving greater benefits than contemplated by either the Letter Agreement or the Promotion. To support this argument, TomTom asserts that allowing the Debtors to use the Sell-through Credits amounts to forcing TomTom to make a cash payment to the Debtors.

44. However, the Debtors seek only to preserve their rights under the Promotion. Under the Promotion, Sell-through Credits arose post-petition as a direct result of the Debtors' marketing and sales efforts, which occurred during their busiest sales period and while TomTom received the benefit of the Debtors' merchandise sale. Moreover, the Debtors do not seek any rights beyond what they bargained for and are entitled to under the Promotion. Finally, contrary to TomTom's assertion, the Debtors do not seek a cash payment for the value of the Sell-through Credits; rather, they seek to apply the Sell-through Credits against, among other things, post-petition purchases of merchandise from TomTom, as provided by the terms of the Promotion.

45. Accordingly, the balance of equities favors denying TomTom's requests for setoff and recoupment.

**VI. THE DEBTORS' RIGHT TO SETOFF IS A VALUABLE ASSET THAT IS PRESERVED UNDER BANKRUPTCY CODE SECTION 558.**

46. Bankruptcy Code section 558 preserves a debtor's defenses, including setoff, vis-a-vis creditors. Bankruptcy Code section 558 provides that:

[t]he estate shall have the benefit of any defense available to the debtor as against any

entity other than the estate, including statutes of limitation, statutes of frauds, usury, and other personal defenses. A waiver of any such defense by the debtor after the commencement of the case does not bind the estate.

11 U.S.C. § 558.

47. Courts have held that section 558 preserves any right of setoff that Debtors may have under state law. In re Women First Healthcare, Inc., 345 B.R. 131, 134 (Bankr. D. Del. 2006); In re ABC-NACO, Inc., 294 B.R. 832, 838 (Bankr. N.D. Ill. 2003); In re PSA, Inc., 277 B.R. 51, 53 (Bankr. D. Del. 2002). Virginia law recognizes a right of setoff. See, e.g., In re Ward, 210 B.R. 531, 536 (Bankr. E.D. Va. 1997) (citing National Bk. and Trust Co. at Charlottesville v. Castle, 196 Va. 686, 695, (1955)).

48. Moreover, the large majority of courts addressing the issue have determined that the Debtors' setoff rights under Bankruptcy Code section 558 are not limited to setting off pre-petition claims, as is the case with a creditor's -- like TomTom's -- right to set-off under Bankruptcy Code section 553. See, e.g., In re ABC-NACO, Inc., 294 B.R. 832, 838 (Bankr. N.D. Ill. 2003) ("almost all of the reported decisions addressing the



issue have held (1) that, generally, claims asserted by a debtor under the Bankruptcy Code are not subject to the limitations applicable to a creditor's right to a bankruptcy setoff or recoupment, and (2) that, specifically, a debtor's counterclaim against a creditor does not require mutuality in the sense of both claims arising pre-petition"). Thus, the Debtors may setoff their pre- and/or post-petition claims against a creditor's pre- and/or post-petition claims. Id.; In re Women First Healthcare, Inc., 345 B.R. at 134 ("Courts have concluded that [under section 558] a debtor may set off pre-petition claims against post-petition obligations it owes."); In re PSA, Inc., 277 B.R. at 53 ("Courts have held that § 558 preserves any right of setoff the debtors may have under state law, including the right to setoff debtor's pre-petition claims against administrative expense claims.").

49. Here, TomTom alleges that the Debtors have accrued Sell-through Credits totaling approximately \$5.4 million. Assuming TomTom's calculations are correct, the Debtors are owed approximately \$5.4 million in

Sell-through Credits that they would be permitted to setoff against post-petition merchandise purchases.

50. Thus, allowing TomTom to impermissibly setoff and/or recoup would deprive the Debtors' estates of valuable setoff rights to the detriment of all creditors.

**VII. TOMTOM HAS NOT SATISFIED EITHER STANDARD FOR RELIEF FROM THE AUTOMATIC STAY.**

51. Assuming, arguendo, Bankruptcy Code section 362 is an appropriate vehicle through which TomTom can exercise rights related to either the Letter Agreement or Promotion, TomTom has failed to establish that relief from the automatic stay is warranted under either Bankruptcy Codes section 362(d)(1) or (d)(2).

**A. TomTom Has Not Established Cause To Modify The Automatic Stay Under 362(d)(1).**

52. Bankruptcy Code section 362(a)(7) prohibits "the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." 11 U.S.C. § 362(a)(7).

53. TomTom seeks relief from the automatic stay of section 362(a)(7) for cause. However, TomTom

has failed to meet its burden of showing that cause exists to modify the stay.

54. A party may be granted relief from the stay under Bankruptcy Code section 362(d)(1) where that party demonstrates that "cause" exists. "The party requesting relief from the automatic stay under § 362(d)(1) has the burden of proving that cause exists for relief from the automatic stay." In re Trius Corp., 47 B.R. 3, 5 (Bankr. D.S.C. 1984); see In re Mazzeo, 167 F.3d 139, 142 (2d Cir. 1999); In re Milstein, 304 B.R. 208, 212 (Bankr. E.D. Pa. 2004).

55. As described above, TomTom has not shown that it has a valid legal or equitable right of setoff or recoupment. In the absence of such a right, no cause exists for this Court to modify the automatic stay.

56. Accordingly, the Debtors respectfully request that the Court deny TomTom's request to modify the automatic stay under section 362(d)(1) to permit setoff or recoupment.

**B. TomTom Has Not Demonstrated That The Debtors Lack Equity To Justify Modifying The Automatic Stay Under 362(d)(2) .**

57. TomTom further cites Bankruptcy Code section 362(d)(2) as a basis for its motion to modify the stay.

58. Bankruptcy Code section 362(d)(2) provides that a court may modify the automatic stay:

with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization . . . .

11 U.S.C. § 362(d)(2) .

59. Because Bankruptcy Code section 362(d)(2) is drafted in the conjunctive, both conditions must be satisfied to grant relief from the stay. See Chrysler LLC v. Plastech Engineered Prods. (In re Plastech Engineered Prods.), 382 B.R. 90, 109 (Bankr. E.D. Mich. 2008) (stating that relief under section 362(d) “requires a showing of both elements”); In re Property Technologies, Ltd., 263 B.R. 750, 754 (Bankr. E.D. Va. 2001) (denying relief under section 362(d)(2) where

movant had not shown that debtor lacked equity, without reference to necessity of property to effective reorganization).

60. Pursuant to Bankruptcy Code section 362(g), TomTom has the burden of proof with respect to the Debtors' lack of equity. Because TomTom has failed to provide any evidence that the Debtors have no equity in the Sell-though Credits (aside from its erroneous assertion of setoff and recoupment rights), the Motion should be denied.

61. Accordingly, the Debtors respectfully request that the Court deny TomTom's request to modify the automatic stay under section 362(d)(2) to permit setoff or recoupment.

#### **RESERVATION OF RIGHTS**

62. As set forth above, the Debtors contend that TomTom does not have a valid right of setoff or recoupment. However, even if this Court finds to the contrary, TomTom has not provided sufficient evidence of the amount of the countervailing claims to be offset or recouped. Because TomTom bears the burden and TomTom has failed to meet that burden, see, e.g., In re Dornier

Aviation (North America), Inc., 2005 WL 4781236 at \*15 (Bankr. E.D. Va. 2005), TomTom cannot practically exercise its right of setoff or recoupment.

63. Thus, should this Court determine that TomTom has a valid right of setoff or recoupment, the Debtors request that, at the hearing on January 16, 2009, the Court set an appropriate discovery schedule to address the factual disputes discussed herein.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter an order denying the relief requested in the Motion.

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Richmond, Virginia SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM, LLP  
Gregg M. Galardi, Esq.  
Ian S. Fredericks, Esq.  
P.O. Box 636  
Wilmington, Delaware 19899-0636  
(302) 651-3000

- and -

SKADDEN, ARPS, SLATE, MEAGHER &  
FLOM, LLP  
Chris L. Dickerson, Esq.  
333 West Wacker Drive  
Chicago, Illinois 60606  
(312) 407-0700

- and -

MCGUIREWOODS LLP

/s/ Douglas M. Foley .  
Dion W. Hayes (VSB No. 34304)  
Douglas M. Foley (VSB No. 34364)  
One James Center  
901 E. Cary Street  
Richmond, Virginia 23219  
(804) 775-1000

Counsel for Debtors and Debtors  
in Possession